

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

LEO DONALD DRONE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**CASE NO. 2:17-CV-00266
CRIM. NO. 2:15-CR-00192(1)
JUDGE GEORGE C. SMITH
Magistrate Judge Vascura**

OPINION AND ORDER

On September 5, 2018, after conducting an evidentiary hearing, the Magistrate Judge issued a Report and Recommendation recommending that this action be dismissed. (ECF No. 126.) Petitioner has filed an Objection to the Magistrate Judge's Report and Recommendation. (ECF No. 128.) Petitioner requests that, because the appeal of right is of such a fundamental nature, the Court err on the side of caution in the contest of witness credibility and grant Petitioner's claim of the denial of the effective assistance of counsel based on his attorney's failure to file a notice of appeal. This Court is not persuaded by Petitioner's argument. Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the reasons discussed in the Magistrate Judge's Report and Recommendation, Petitioner's Objection (ECF No. 128) is **OVERRULED**. The Report and Recommendation (ECF No. 126) is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

The Court **DECLINES** to issue a certificate of appealability.

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to

appeal from an adverse decision by a district court.” *Jordan v. Fisher*, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal.)

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

This Court is not persuaded that reasonable jurists would debate the dismissal of Petitioner’s claim of the denial of the effective assistance of counsel as without merit. Therefore, the Court **DECLINES** to issue a certificate of appealability.

The Court **CERTIFIES** pursuant to 28 U.S.C. § 1915(a)(3) that the appeal would not be in good faith, and that an application to proceed *in forma pauperis* on appeal should be **DENIED**.

The Clerk is **DIRECTED** to enter final **JUDGMENT**.

IT IS SO ORDERED.

s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT